

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**RHONDA MCGINNIS**

**RESPONDENT,**

**v.**

**NORTHLAND READY MIX, INC.**

**APPELLANT.**

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**DOCKET NUMBER WD71317  
MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE: May 24, 2011**

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**Appeal From:**

Clay County Circuit Court  
The Honorable Anthony Rex Gabbert, Judge

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**Appellate Judges:**

Division One: Thomas E. Newton, P.J., and James M. Smart, Jr., and Joseph M. Ellis, JJ.

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**Attorneys:**

James Charles Wirken, Kansas City, MO, for respondent.

Mark Edward Kelly and Kristi Lanae Pittman, Liberty, MO, for appellant.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**RHONDA MCGINNIS,**

**RESPONDENT,**

**v.**

**NORTHLAND READY MIX, INC.,**

**APPELLANT.**

No. WD71317

Clay County

Before Division One: Thomas E. Newton, P.J., and James M. Smart, Jr., and Joseph M. Ellis, JJ.

Northland Ready-Mix, Inc. ("NRM"), a cement mixing plant, appeals a judgment for damages in favor of adjacent property owner Rhonda McGinnis following a jury trial on claims of a temporary nuisance resulting from the flow of excess water onto her two properties. NRM contends the trial court erred in failing to grant its motion for directed verdict or judgment notwithstanding the verdict because McGinnis failed to prove the elements of her claim for temporary nuisance, specifically unreasonable use and actual damages. In addition, NRM claims the court erred by allowing the jury to consider appraiser Robin Marx's testimony without a proper foundation and denying its motion for new trial after allowing McGinnis's trial counsel's "send a message" argument in closing.

**AFFIRMED.**

**Division One holds:**

(1) The jury instructions fully apprised the jurors of the factors they were to consider in determining whether NRM used its property in an unreasonable manner by allowing water containing cement to flow onto McGinnis's property. Viewing the evidence in the light most favorable to the verdict, there was ample evidence to support the jury's conclusion that this use of NRM's property was unreasonable given the locality, character of the neighborhood, zoning, nature of use, extent of injury, and effect upon McGinnis's enjoyment of life.

(2) McGinnis was not required to show actual damage, and the jury's \$50,000 verdict, considered in the light most favorable to the verdict, was supported by McGinnis's expert appraiser's testimony concerning market-based rental loss for the properties in question and McGinnis's testimony regarding her discomfort and inconvenience caused by the nuisance.

(3) Because NRM did not timely object to alleged lack of foundation of McGinnis's expert's testimony, its claim was waived. Even so, no manifest injustice or error, plain or otherwise, was present as the expert testimony was neither confusing nor misleading.

(4) NRM failed to object to opposing counsel's first comment to the jury to "send a message" and, thus, failed to preserve any error for review. Upon opposing counsel's second "send a message" comment, NRM objected, but made no objection that opposing counsel's "rephrasing" was inadequate and did not request that counsel be admonished or that the jury be instructed to disregard the remarks. The trial court did not abuse its discretion or err in denying NRM's Motion for New Trial.

All points are denied and the judgment is affirmed.

Opinion by James M. Smart, Jr., Judge

May 24, 2011

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